In my opinion Amir is the registered owner and was an essential party to these proceedings.

I see no reason why a lease or agreement for a lease should not impose contractual liabilities upon the lessor merely because the lease cannot be registered under the Land Enactment. Non-registration may result in a person acquiring the land from a lessor who is registered as owner not being bound by the lease, provided the lease was not made or promised by the lessor as agent on behalf of such person.

The agreement of lease was first made in 1933 by Amir bin Haji Ali and Ramlah binte Haji Arip, the then registered owners, for a term of ten years to the appellant who was obliged to clear the land once in every six months. In 1939 Amir bin Haji Ali having become the registered owner as guardian, made a new lease to the appellant for the remainder of the ten years. Under this lease the appellant pays the land rent and undertakes to keep the land clearly weeded. The lease recites that $300 is now paid to the lessor and the receipt of this money is acknowledged. Whether or not this is the same $300 as was mentioned in the first lease I do not know, but it is quite clear that the plaintiff gave consideration and that the lease might be enforced against the registered owner, and I am not prepared to assume that the beneficiaries did not receive the money paid by the plaintiff for the lease.

Mr. Barrett referred to section 31 of the Courts Enactment which is to the effect that a decree shall not be reversed on account of misjoinder of parties or causes of action. This is a very different thing to saying that the Court has jurisdiction in case of non-joinder of necessary parties. Amir is the registered owner and, as he is not a party, his rights and liabilities have not been considered.

As he was not made a party the action was not properly constituted, and the appeal is allowed with costs here and below.

Aitken, Ag. J.A.—I have had the advantage of reading the judgments which will be delivered in this appeal by the two senior members of the Court. They cover every substantial point which was raised during the argument, and I entirely agree with the conclusions thereon at which they have arrived.

In these circumstances no useful purpose would be served by my writing a separate judgment to the same effect. I therefore concur in allowing this appeal, and the order as to costs should, in my opinion, be that which is set out in detail at the end of the judgment of the Acting Chief Justice of the Federated Malay States.

Appeal allowed.

[APPELLATE CIVIL JURISDICTION]

McELWAINE, C.J. (S.S.), TERRELL, Ag. C.J. (F.M.S.) & AITKEN, Ag. J.A.

June 21, 1941.

KEPOL BIN SA'ABAN, Administrator of the estate of NYONYA BINTE BAHUDIN alias NYONYA BINTE YOKDIN, deceased ..... Appellant Plaintiff

vs.

HITAM BINTE BAHUDIN ..... Respondent Defendant.

[JOHORE CIVIL APPEAL No. 2 of 1941]

Land Enactment, Sections 42 and 44—Recovery of document of title from former registered proprietor —Obligation to surrender.

When a person has been recorded in a mukim register under Section 42 of the Land Enactment as an owner of land, he is entitled to recover the Extract issued to the person formerly recorded as owner. If it cannot be recovered by means of the powers conferred upon the Collector by Section 44, an action will lie to enforce its surrender.

Case referred to:—

(1) *Waghelda Rajsanji v. Shekh Masludin* 11 Bom. 561. (1886-87) 14 I.A. 89, 96

CIVIL APPEAL.

The facts and arguments appear from the judgments set out hereunder:

In the Court of first instance.

Das for plaintiff.

MacIntyre for defendant.

Manning, J.—In 1938 the name of the defendant was recorded in the register of Mukim V, Batu Pahat, as the owner of a certain piece of land. She had been issued with, and was rightfully in possession of, the usual document of title in such cases, namely an extract from the Mukim Register.

On the 5th August 1939, the plaintiff, as the administrator of the estate of Nyonya binte Bahudin, made an application to the Collector to record the

plaintiff as owner of the land under section 42 of the Land Enactment. The Collector held an inquiry under the section. The defendant was present and gave evidence on her own behalf. The Collector heard also the evidence of a number of other witnesses and at the conclusion of his enquiry was of opinion that the application of the plaintiff should be granted. He made an order in accordance with his decision, and the necessary entry was made in the mukim register.

The defendant did not avail herself of her right of appeal to the Commissioner, but she retained possession of her document of title and in the present action the plaintiff asks that she be ordered to deliver it to him together with the coupon card and the tapping licence.

Now the Land Enactment has provided a special procedure with reference to such a case as this. As soon as the Assistant Collector had decided in favour of the plaintiff he decided in effect that the document of title, E.M.R. 1825, had been issued in error to the defendant. Section 23 of the Enactment, which appears in Part I under the title "General", empowered the Collector to issue a notice to the defendant to deliver up the document to be cancelled. If the defendant refused to comply with the notice, the Collector might apply to the Court for a summons to the defendant to show cause, and the Court had jurisdiction to direct the cancellation of the document and the substitution for it of a document of title in favour of the plaintiff.

These provisions are important. The proceedings have to be initiated by the Collector. The document of title wrongly issued has to be delivered to him to be cancelled, there is no provision for any delivery to the rightful owner. The Court has no jurisdiction until the holder of the erroneous document neglects or refuses to give it up and until the Collector has applied for a summons. But whether the document is delivered up or not, the rightful owner has no right to it; what he eventually obtains is a new document of title. I therefore think that the plaintiff's action is misconceived. Mr. Das on his behalf referred me to a passage in Halsbury's Laws of England Vol. 24 page 239, stating that an owner of land is entitled to maintain an action for the title-deeds to the land. This can surely have no application to a case like the present where the title-deed is a document of title which has been issued to the wrong person under a system of registration. I am satisfied that the plaintiff has no right to the possession of the document; and that the Court should not assume jurisdiction to rectify otherwise than in accordance with the mode prescribed.

There was a further point raised by Mr. MacIntyre on behalf of the defendant. He submitted that the Collector had no jurisdiction to make the order he did under section 42 of the Land Enactment, that his decision was therefore a nullity, and that being so, the foundation of the plaintiff's case disappears. He put his argument in this way. The jurisdiction of the Collector to hold an inquiry under section 42 arises only when a person is asserting a right otherwise than by succession to a deceased proprietor or by virtue of an agreement for sale. The plaintiff in this case applied to the Collector under section 42 as administrator of the estate of one Nyonya, deceased, he was therefore asserting a right by succession to a deceased proprietor and the Collector's jurisdiction was ousted. Mr. Das, for the plaintiff, said that an administrator does not assert a right by succession, and referred me to section 4 of the Probate and Administration Enactment where it is stated that an administrator is the legal representative of a deceased person for all purposes. He also referred to the action of the plaintiff as being merely the enforcement of a trust or of a right of action left by Nyonya.

Mr. MacIntyre's point depends on whether an administrator asserts a right by succession. I think that when the question of jurisdiction is an arguable matter, it should be decided on appeal and after full argument. Where no jurisdiction clearly exists, a Court will not shrink from declaring the consequent order to be a nullity. In the present case I am prepared to assume that what the Collector did was within his jurisdiction. If, however, Mr. MacIntyre is right, that would be an additional reason for refusing any relief to the plaintiff.

There must be judgment for the defendant with costs.

Before the Court of Appeal.

Das for plaintiff-appellant.

M. V. Pillai for defendant-respondent.

McElwaine, C.J. (S.S.)—The facts are sufficiently stated in the judgment of Terrell, Ag. C.J., F.M.S., and I need not repeat them.

The Mukim Register shows that the appellant was on 15th October, 1940, registered as owner of this land as attorney of the administrator of Nyonya's estate. This was done pursuant to an order made

on 7th March, 1940, by the Collector after an inquiry at which the respondent Hitam gave evidence. It was argued that section 42 (i) of the Land Code as amended by The Small Estates Enactment, 1936, gave the collector no power to make this order. I think it does. The application was made on behalf of the estate of Nyonya to remove the name of the respondent as registered owner from the Mukim Register. Nyonya's rights were not derived by succession from Hitam who had procured the registration of herself as owner of land to which Nyonya was entitled. In my opinion the order registering the appellant as owner is a valid order.

The position then is that the appellant is registered owner and the respondent holds an Extract shewing her to be the owner, her Extract having been issued before the rectification of the Register.

The respondent has no right, title or interest in the land, but so long as she holds the Extract which she cannot use for any honest purpose, a new Extract will not issue. The appellant has a transferable right in the land under section 40 and, although, the production of an Extract does not appear to be absolutely essential before an owner acts under section 48, I have no doubt he would be gravely inconvenienced in selling or charging the land if the Collector knows that an Extract is floating about somewhere.

There is no express provision in the Enactment requiring the respondent to give up her Extract but I think such a provision must be implied in order to implement the rights which the Enactment confers upon a registered owner.

If a person is legally divested of a title it seems to me that person has no right to retain the Extract and so defeat the rights of the owner of the land.

It is stated in 27 Hailsham, para. 1082, that the owner of land may maintain an action to recover the title-deeds, and although an Extract may not so savour of the land as to be deemed part of it, it appears to me that in the absence of any statute law of the State of Johore enacting to the contrary, this Court must decide the matter in the words of the Judicial Committee in *Waghelda Rajsanji v. Shekh Masludin*[1], "by equity and good conscience generally interpreted to mean the rules of English law if found applicable to Indian Society and circumstances", and I the more readily do so, as to do otherwise would hinder the appellant in his right which the Land Enactment says he shall have.

I would allow the appeal with costs here and below.

Terrell, Ag. C.J. (F.M.S.)—In or about the year 1925 one Busu was entitled to D.P. 284/25 having an area of some six or seven acres. A D.P. is not a title but a kind of occupation permit, which will normally entitle the occupier to a title on payment of the premium and survey fees. There is frequently a long interval between the date of the application and the issue of the title, and there was in this case.

Busu died leaving two daughters, Hitam the present respondent, and Nyonya since deceased, the appellant being the administrator of her estate. On Busu's death in or before 1929, a title in respect of D.P. 284/25 was not yet ready for issue, and the Collector decided to split up D.P. 284/25, and in L.O.C. 7/29, Hitam was recorded as the owner of D.P. 15/37, and Nyonya of D.P. 16/37.

It would appear that early in 1937, the title-deed in respect of D.P. 16/37 became ready for issue. Nyonya died on the 3rd of January, 1930, her children were minors, and her husband had taken no steps to apply for letters of administration. The dues were unpaid, and there was a danger that the application might be cancelled and the land forfeited. In these circumstances Hitam who had paid the dues and obtained a title in respect of her own land D.P. 15/37, was notified. She raised money by leasing the land to a Chinese, and paid the necessary dues. Thereupon Mr. Dohoo, a Collector of Land Revenue, cancelled the name of Nyonya and substituted that of Hitam, and on the 14th of May, 1938, E.M.R. 1825 was duly registered in the name of Hitam in respect of D.P. 16/37. Then in 1939 the present appellant obtained administration to Nyonya's estate as the attorney of her husband, and applied under section 42 (i) to be registered as the owner of E.M.R. 1825 in place of Hitam. An enquiry was held pursuant to the section and, on the 7th of March, 1940, the Collector made an order transmitting the E.M.R. to the appellant as representative, and the necessary entry was made in the Register. Hitam was present at the enquiry, but she did not avail herself of her right of appeal under section 43. Unless, therefore, the Court is satisfied that the Collector's order was made without jurisdiction, the merits of such order cannot now be questioned.

It is argued that under section 42 (i) which now reads "any person asserting that he has a right otherwise than by succession to a deceased proprietor, etc.", the jurisdiction of the Collector was excluded, as the

appellant claimed by succession from Nyonya. This argument is entirely misconceived. The Collector has two jurisdictions enabling him to alter the register and to put therein the names of the persons entitled. First, under Enactment 8/36 'Small Estates', the Collector on the death of a proprietor is empowered to make and register a distribution order in favour of the persons entitled, according to the rules for the distribution of an intestate's estate. Secondly, if the claim is otherwise than by succession, the Collector proceeds under section 42 of the Land Enactment. The amendment of section 42(i) was made by Enactment 8/36, merely to prevent the two jurisdictions from overlapping.

The question therefore is, was the application before the Collector one for the distribution of Nyonya's estate. It clearly was not; it was an application to be put on the register in the place of Hitam. Although therefore the claim was in fact made by an administrator, it was a claim against Hitam and not a claim which arose by succession.

I see no reason therefore to question the validity of the Collector's order of the 7th of March 1940. But that was only the beginning of the trouble. Although Kepol had succeeded in getting on to the register, the E.M.R. corresponding to the issue copy of the title was with Hitam, and apparently she refused to give it up. Although the procedure for rectifying the register is laid down in section 42(ii), there is no specific provision that the former registered proprietor shall hand in the E.M.R. Under section 44(i), however, the Collector can require any person to attend before him, and produce all documents in his possession relating to any right to an interest in the land. A procedure having been laid down in section 44(i), I do not think that section 23 (correction of errors) has any relevence. In my opinion section 23 relates more to the correction of errors of a clerical nature. The Collector, however, did not get hold of the E.M.R. by the means indicated in section 44(i), but issued a summons under section 155, charging Hitam before a magistrate with an offence against the provisions of the Land Enactment. As Hitam had not committed any offence, she was in due course acquitted, and the Collector thereupon seems to have washed his hands of the matter, leaving E.M.R. in Hitam's hands.

Without the E.M.R. the appellant's success in getting himself on to the register was of little avail. He could not sell or deal with the land, and could not even get rubber coupons. It was argued that the appellant might by some process have compelled the Collector to take action, but it would seem that it was too late to proceed under section 44(i) after the enquiry had been closed, and I have given reasons for thinking that the procedure under section 23 was inapplicable. In these circumstances the appellant took the only course which appeared to remain open to him, and he sued in the Supreme Court for the recovery of the title-deed.

I do not agree with the learned Judge's statement that the rightful owner has no right to the title-deed held by Hitam, but that what he eventually obtains is a new document of title. According to the Land Enactment, a document of title is only issued (a) under section 39 when the land is originally alienated, or (b) under section 18 when a document of title is lost or wholly or partially destroyed. It is inconceivable that the Enactment should contemplate the issue of a second title-deed when one is already in existence. If the appellant recovers the title-deed, he can take it to the Collector, and request him to make the E.M.R. correspond to the register, as is the case when any other transaction is registered under section 47. As things stand, section 40 purports to give the person whose name is recorded on the register, 'a permanent, transmissible and transferable right, interest and occupancy in his land', but owing to the retention of the title-deed by the respondent such right and interest is quite illusory. An unincumbered owner of land is always entitled to his title-deeds, and the fact of registration does not appear to me to lessen such right. In my opinion, therefore, the appellant is entitled to the relief claimed in paragraph 4(a) of the plaint.

The appeal will be allowed and the judgment below set aside. The appellant will be entitled to the costs of the appeal and in the Court below, and the deposit should be paid out to him or his solicitor.

Aitken, Ag. J.A.—I have had the advantage of reading the judgments which will be delivered in this appeal by the learned Chief Justice of the Straits Settlements, and by the learned Acting Chief Justice of the Federated Malay States. I entirely agree with both of them and have nothing to add.

Appeal Allowed.